Filed 11/10/09 In re B.E. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re B.E., a Person Coming Under the Juvenile Court Law.	B216127 (Los Angeles County Super. Ct. No. CK67510)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. R.E., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County. Jan Levine, Judge. Affirmed in part, reversed in part, and remanded with directions.

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Judy Weissberg-Ortiz, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the County Counsel, Robert E. Kalunian, Acting County Counsel, James M. Owens, Assistant County Counsel, and Frank J. DaVanzo, Deputy County Counsel, for Plaintiff and Respondent.

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R.E. (Mother) appeals from the juvenile court's orders summarily denying her petition to reinstate family reunification services with respect to her seven-year-old son, B.E., and terminating her parental rights. She also contends that because the Department of Children and Family Services (DCFS) failed to provide adequate notice under the Indian Child Welfare Act (25 U.S.C., § 1901 et seq. (ICWA) the juvenile court erred in finding that the Act did not apply. We affirm the court's order denying a hearing on Mother's petition to reinstate family reunification services, but we reverse the order terminating parental rights, and remand with directions to provide proper ICWA notice.

BACKGROUND

On March 6, 2007, DCFS received a referral alleging that B.E. was at substantial risk because there was no food in the home. The referral also alleged that Mother had been observed smoking crystal methamphetamine. Two days later a social worker met with Mother who told the worker that she purchased food every day but did not keep it at home because she lived in a motel. She denied using illegal drugs and said that she was taking psychotropic medications for her schizophrenic symptoms. Mother agreed to take a drug test. Then five-year-old B.E. appeared clean and healthy. He told the social worker that Mother fed him regularly.

On March 13, 2007, Mother tested positive for methamphetamine, marijuana, and alcohol.

On March 20, 2007, the social worker arranged a team decision meeting with Mother, DCFS, and personnel from the Beyond Shelters organization, from whom Mother had been receiving assistance, including motel housing. During the meeting Mother admitted that she had been using a variety of illicit drugs continuously for over 30 years. Mother had been concealing her drug use from her case manager because drug use was not permitted while participating in the Beyond Shelters program. Mother explained that she used the money she received from SSI to purchase drugs and that she used the drugs in the motel bathroom while B.E. was in the bedroom sleeping or watching television. Mother admitted that she had used crystal methamphetamine just

the night before. Mother explained that she usually used crystal methamphetamine to bring her "up" and alcohol to bring her "down." Mother had been sober for two years but said that she had relapsed after the death of her "ex-husband" last year, and tended to relapse when "stressed out."

Mother had two teenage children whom she had left with her "ex-husband" when they were three and four years old, respectively. Mother stated that she had left because of his drug use and because he had physically abused her. Mother was not sure who, if anyone, was taking care of these children now, and assumed that because of their age they were taking care of themselves.

Mother said that she had a good relationship with her brother but claimed that he also used illegal drugs. The maternal grandmother lived in Nevada but was suffering from cancer and was unable to care for B.E. The maternal grandfather lived in Washington State, but Mother did not want DCFS to involve him in the dependency case because she had had an incestuous relationship with him.

After the meeting on March 20, 2007, DCFS detained B.E. in foster care.

On March 23, 2007, DCFS filed a Welfare and Institutions Code section 300 petition alleging that B.E. was a dependent child described in subdivision (b).[1] The petition alleged that Mother had a history of illicit drug use and was a current user of amphetamine, methamphetamine, and marijuana which rendered her incapable of providing B.E. adequate care. The petition further alleged that Mother used illicit drugs in the home, bought illicit drugs in the child's presence, and had a history of drug-related convictions.

At the March 23, 2007, detention hearing the court reviewed the ICWA form Mother had executed and inquired whether Mother had American Indian ancestry. Mother confirmed that she did, and that her father was a member of the Tlingit Tribe of Alaska. Mother reported that she had also registered as a member of the Tlingit Tribe in

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1 Further unmarked statutory references are to the Welfare and Institutions Code.

1971 and offered to search for her registration documents. The court ordered DCFS to notify the tribe, the Secretary of the Interior and the Bureau of Indian Affairs.

Mother confirmed that the identity of B.E.'s father was unknown.

The court found that the petition stated a prima facie case for detention and ordered B.E. detained in shelter care. The court granted Mother monitored visits with B.E. three times a week.

DCFS submitted additional information before the combined jurisdiction and disposition hearing. Mother admitted that she had been abusing illegal drugs since she was 12 years old and admitted currently using methamphetamine, marijuana, and alcohol. Mother stated that B.E. was with her when she purchased drugs but claimed that he was so young he did not notice anything wrong. When B.E. was either asleep or watching television she went into the bathroom of the small motel room, closed the door, and used drugs. Mother explained that she used drugs "'because I like to.'" Mother reported that she received SSI payments because she suffered from a mental illness.

The maternal grandmother confirmed that Mother had a long history of drug abuse. She informed DCFS that due to her weakened condition from cancer she was physically unable to care for B.E. The maternal uncle stated that his small living quarters also made him an unsuitable caretaker for B.E.

On April 19, 2007, at the combined jurisdiction and disposition hearing, Mother waived her trial rights and admitted the allegations of the petition. The court sustained the allegations of the petition, declared B.E. a dependent child, and ordered DCFS to provide Mother reunification services, including drug rehabilitation with random testing, parenting classes, psychological services, and compliance with psychotropic medications. The court offered Mother visits with B.E. monitored by DCFS.

DCFS mailed the ICWA notices on April 10, 2007, to the Tlingit Tribe, the Secretary of the Interior and the Bureau of Indian Affairs and had not yet received any response by the April 19, 2007, hearing date. The court commented that the ICWA

responses should arrive before the next hearing date of May 16, 2007, and that it would hold a new disposition hearing in the event DCFS learned that ICWA applied.

On May 3, 2007, DCFS sent a duplicate set of ICWA notices regarding the progress hearing scheduled for May 16, 2007. This time DCFS sent a notice to the Central Council of the Tlingit and Haida Indian Tribes of Alaska. Again, DCFS received no response. On May 16, 2007, the court declared that notice was proper and that ICWA did not apply.

By the six-month review hearing (§ 366.21, subd. (e)) held on October 18, 2007, B.E. was attending kindergarten, enjoying his school and teacher, and was making many friends. B.E. had weekly, one-hour, monitored visits with Mother who usually initiated the visits and was very consistent. She brought food or small gifts and all visits were appropriate

B.E.'s foster mother reported that she was concerned that B.E. sometimes showed symptoms of depression, was socially withdrawn, and occasionally "dozed off." The foster mother also reported that B.E. occasionally smeared feces and acted aggressively toward the other foster boys in the home. The foster mother was concerned that B.E.'s learning abilities might be impaired if untreated.

B.E. was evaluated by a psychologist who concluded that B.E. had cognitive difficulties and "that his significant anxiety adversely impacts his performance." The psychologist opined, "it may be that a lack of exposure to stimulating cognitive activities in the early years of life has impacted his current functioning." The psychologist recommended that B.E.'s hearing be tested to rule out hearing impairment, that an individual education plan be devised to assist him in kindergarten, that the foster mother work with B.E. to build and strengthen his safety awareness skills, and that B.E. receive therapy given his "extensive history of trauma and current difficulties expressing his emotions."

Mother was living in a sober living home. According to the house manager, the program required two years' attendance. Mother participated in mental health services

through Downtown Mental Health where her treatment goals were to obtain suitable housing. According to her case manager, Mother did not meet the criteria for mental health services because Mother's cognitive delays were possibly due to extensive substance abuse rather than to mental illness. Mother had also enrolled in substance abuse programs which provided counseling, education, and random testing. She submitted to six random tests in one program with negative results. In the other program, Mother submitted to four random drug tests with three negative results and one positive result for marijuana.

By the 12-month status review hearing (§ 366.21, subd. (f)) Mother had moved into another sober living home and was actively participating in a substance abuse program, mental health program, and in a transitional employment program to assist her with learning employment skills and in finding stable housing. Mother continued making progress and consistently tested negative for illegal substances. B.E. had visits with Mother every Sunday, monitored by the foster mother.

Auditory tests showed that B.E.'s hearing was within normal range. B.E. was placed on a waiting list to receive individual therapy. A DCFS social worker reported that B.E.'s foster mother had been providing him excellent care and supervision and recommended that B.E. remain with her until Mother completed her substance abuse program and obtained suitable housing.

The court commended Mother on her efforts during the year and found that she was in partial compliance with her case plan. Based on Mother's progress the court permitted her unmonitored visits with B.E.

In a report submitted for the 18-month review hearing dated September 23, 2008, DCFS stated that its initial recommendation was to continue reunification services for a few more months to enable Mother to find suitable housing. DCFS learned in the interim, however, that Mother had not participated in her substance abuse programs in the past few weeks and as a result now recommended instead that the court terminate services.

The foster mother reported that Mother's visits and telephone calls had recently become sporadic and inconsistent. The child's social worker reported that the foster mother had consistently met B.E.'s needs and that B.E. had "dramatically improved since being placed in her home. Both [the foster mother and B.E.] appear to have a very trusting and healthy relationship with each other." DCFS reported that the foster mother had been supportive of Mother and was receptive to permitting Mother continued visits with B.E. after adoption.

Mother disputed the representations that she had stopped participating regularly in her programs and requested a contested hearing on DCFS's recommendation to terminate services. The court granted Mother's request for a hearing and ordered her to submit to drug testing before the hearing date.

In an interim review report dated October 23, 2008, DCFS reported that Mother was living in transitional housing which was not suitable for B.E. because Mother shared one room with three other women. Mother had resumed attending programs at the recovery treatment center and the program administrator stated that if Mother continued to attend and participate that she could complete the program by December 2008. Mother tested twice after the last court date and both tests were negative.

In late October, Mother reported to DCFS that she had arranged for her and B.E. to live in the house of a female acquaintance. DCFS attempted to assess the residence but ultimately the person informed DCFS that she was not able to provide Mother with housing. On November 3, 2008, Mother reported that she had found different living arrangements in a three-bedroom home she intended to share with two other adult roommates. DCFS noted that the roommates would need to be investigated before it could find the housing arrangement suitable for B.E.

The 18-month review hearing had been continued several times and was finally heard on December 22, 2008. On that date, Mother withdrew her request for a contest. In random drug testing Mother had tested positive for cocaine on October 17 and November 12, 2008. She failed to take three other scheduled tests on October 23,

October 27, and November 6, 2008, and had tested negative twice on November 26 and December 3, 2008.

The court found that Mother had partially complied with her case plan and that DCFS had made reasonable efforts to reunite B.E. with Mother. It ordered reunification services terminated and set a hearing date to select a permanent plan for B.E. (§ 366.26).

An adoption home study of the foster mother's home had been completed in October 2008. The foster mother continued to be interested in adopting B.E., and B.E., for his part, stated that he liked living with his foster mother and wanted to keep living there "forever." According to the social worker, B.E. appeared to be a normal, healthy child. He was comfortable with his foster mother and called her "Mom."

On April 20, 2009, the date set for the section 366.26 hearing, Mother requested a contested hearing which the court granted and set for May 14, 2009. On May 11, 2009, Mother filed a petition pursuant to section 388 requesting reinstatement of reunification services. In her petition Mother stated that she had substantially rehabilitated herself by participating in the programs, had maintained contact with B.E. and that a change in the court's order was warranted because further estrangement from B.E. was not in his best interest. Mother requested the court to vacate the section 366.26 hearing date, conduct a new section 366.22 hearing, and continue family reunification services.

On May 14, 2009, the court heard argument on the issue whether to grant a hearing on Mother's section 388 petition. After considering counsels' argument, the court denied Mother's request for a hearing, finding that her petition presented no new evidence or changed circumstances to warrant a hearing. In a written order the court denied her section 388 petition.

The court then proceeded to the contested section 366.26 hearing. DCFS entered into evidence the report, attachments, and supplemental reports prepared for the section 366.26 hearing and rested. Mother appeared at the hearing and testified. She testified that she visited B.E. once or twice a month for three hours at a time and that all visits had

gone very well. She said she also telephoned B.E. regularly and that they talked for approximately 10 minutes about their daily activities.

The court found by clear and convincing evidence that B.E. was adoptable and terminated parental rights. This appeal followed.

DISCUSSION

Denial of a Hearing on Mother's Section 388 Petition

Mother contends the court abused its discretion in declining to hold a hearing on her section 388 petition. We disagree.

"The petition pursuant to section 388 lies to change or set aside any order of the juvenile court in the action from the time the child is made a dependent child of the juvenile court (*In re Stephanie M*. (1994) 7 Cal.4th 295, 316; *In re Marilyn H*. [(1993)] 5 Cal.4th [295] at pp. 308-309), including the order after a permanency planning hearing. (See, e.g., *In re Stephanie M*., *supra*, 7 Cal.4th 295; *In re Marilyn H*., *supra*, 5 Cal.4th 295; *In re Heather P*. (1989) 209 Cal.App.3d 886, 891-892.)" (*In re Jasmon O*. (1994) 8 Cal.4th 398, 415.) The petition must be verified and "set forth in concise language any change of circumstance or new evidence which are alleged to require the change of order . . . ." (§ 388, subd. (a).)

"The parent seeking modification must 'make a prima facie showing to trigger the right to proceed by way of a full hearing. [Citation.]' (*In re Marilyn H*. (1993) 5 Cal.4th 295, 310; *In re Jeremy W*. (1992) 3 Cal.App.4th 1407, 1412-1414.) There are two parts to the prima facie showing: The parent must demonstrate (1) a genuine change of circumstances or new evidence, and that (2) revoking the previous order would be in the best interests of the child[]. (*In re Kimberly F*. (1997) 56 Cal.App.4th 519, 529.) If the liberally construed allegations of the petition do not show changed circumstances such that the child's best interests will be promoted by the proposed change of order, the dependency court need not order a hearing. (*In re Zachary G*. (1999) 77 Cal.App.4th 799, 806.)" (*In re Anthony W*. (2001) 87 Cal.App.4th 246, 250; see also, Cal. Rules of Court, rule 5.570(d) ["If the petition fails to state a change of circumstance or new

evidence that may require a change of order . . . , or that the requested modification would promote the best interest of the child, the court may deny the application ex parte"].)

We review the juvenile court's summary denial of a section 388 petition for abuse of discretion. (*In re Anthony W.*, *supra*, 87 Cal.App.4th at p. 250.)

Mother failed to make the showing necessary to obtain a hearing. Mother's burden was to present prima facie evidence that changed circumstances had occurred between the time the court terminated services on December 22, 2008, and May 11, 2009, when she filed her petition, which warranted a change in the court's order. To satisfy this initial element of showing changed circumstances, Mother alleged that she had "substantially rehabilitated herself" by participating in classes and programs. Mother attached a letter from her substance abuse counselor at New Beginnings dated May 8, 2009, stating that Mother had been "attending and actively participating" in the programs and that she had "been tested randomly with negative results."

When the court entered its order terminating services, Mother had relapsed and had tested positive for cocaine on two occasions, and had failed to test on three other occasions. Mother had also stopped visiting and calling B.E. on a regular basis during this time. After these events, and after the court entered its order terminating services on December 22, 2008, Mother resumed attending and participating in substance abuse programs and had tested negative for illegal drug use. However, given Mother's 30-year history of substance abuse, and her recent relapse, evidence that she had resumed participating in a substance abuse program did not present prima facie facts of changed circumstances sufficient to warrant a hearing on her petition. (See *In re Angel B.* (2002) 97 Cal.App.4th 454, 465 [allegations of a petition that Mother had remained sober, completed classes, obtained employment and visited regularly were legally insufficient to warrant a hearing on her section 388 petition].)

Mother's petition failed to satisfy the first prong of the dual requirements for a hearing. We accordingly conclude that the court acted within its discretion in finding that

Mother's section 388 petition did not state a prima facie case for a change in the court's order sufficient to warrant a hearing. (*In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1451.)

ICWA Notice

Mother contends, and DCFS concedes, that the ICWA notices were flawed in numerous respects. We agree, and conditionally reverse the order terminating parental rights.

"State law mandates notice to 'all tribes of which the child may be a member or eligible for membership.' (§ 224.2, subd. (a)(3).)" (*In re J.T.* (2007) 154 Cal.App.4th 986, 992.) The 2006 enactment of section 224.2 expressly provides that "heightened state law standards shall prevail over more lenient ICWA requirements." (*Id.* at p. 993.)

"The purpose of the ICWA notice provisions is to enable the tribe or the BIA to investigate and determine whether the child is in fact an Indian child. [Citation.] Notice given under ICWA must therefore contain enough information to permit the tribe to conduct a meaningful review of its records to determine the child's eligibility for membership." (*In re Cheyanne F.* (2008) 164 Cal.App.4th 571, 576.)

"Section 224.2, subdivision (a) codifies notice requirements set forth in the federal regulations implementing ICWA. [Citation.] Both the federal regulation and section 224.2, subdivision (a) require the social services agency to provide as much information as is known concerning the child's direct lineal ancestors, including all names of the child's biological parents, grandparents, and great-grandparents, or Indian custodians, including maiden, married and former names or aliases, as well as their current and former addresses, birthdates, places of birth and death, tribal enrollment numbers, and any other identifying information, if known. (25 C.F.R. § 23.11(d)(3) (2008); Welf. & Inst. Code, § 224.2, subd. (a)(5)(C).)" (*In re Cheyanne F., supra,* 164 Cal.App.4th at p. 575, fn. 3.)

Substantial evidence does not support the court's finding of proper ICWA notice because the notices did not contain all the necessary information. For example, the

notices lacked B.E.'s full name. The notices also indicated that information on his maternal grandparents was "unknown" although Mother had supplied the necessary information and DCFS had contacted the maternal grandmother at least twice during these proceedings. Although mother informed the DCFS and the court that her father was a member of the Tlingit Tribe, the ICWA notices provided no information at all regarding the maternal grandparents. Additionally, the ICWA notices named the Tlingit Tribe, or the Tlingit and Haida Tribe, inconsistently, and the notices were not addressed to the proper agents. (See Cal. Rules of Court, rule 5.481(b) ["Notice to an Indian child's tribe must be sent to the tribal chairperson unless the tribe has designated another agent for service"].) As the DCFS concedes, these omissions in the ICWA notices prevented any "meaningful review" of the tribal records. (*In re Cheyanne F*., *supra,* 164 Cal.App.4th at p. 576.)

When DCFS reported that it had received no response to its ICWA notices the court found that this was not a case covered by ICWA. The court made this finding only eight days after delivery of the notice to the Tlingit and Haida Central Council in Alaska, although rule 5.482(a) of the California Rules of Court specifies that a court hearing may not proceed until *at least 10 days after* the necessary people and entities have *received* proper ICWA notice, and although section 224.3, subdivision (e)(3) specifies that a court may only make a finding that ICWA is inapplicable after waiting 60 days when no determinative response is received after proper notice.[2]

Because ICWA notice requirements were not satisfied, we remand for the limited purpose of ensuring proper ICWA notice. (*In re Rayna N*. (2008) 163 Cal.App.4th 262,

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2 Section 224.3, subdivision (e)(3) provides: "If proper and adequate notice has been provided pursuant to Section 224.2, and neither a tribe nor the Bureau of Indian Affairs has provided a determinative response within 60 days after receiving that notice, the court may determine that the [ICWA] does not apply to the proceedings, provided that the court shall reverse its determination of the inapplicability of the [ICWA] and apply the act prospectively if a tribe or the Bureau of Indian Affairs subsequently confirms that the child is an Indian child."

268 [“section 224.2, subdivision (d), does not prohibit a limited reversal and remand to permit compliance”].)

DISPOSITION

The order denying a hearing on Mother’s section 388 petition is affirmed. The order terminating parental rights is reversed, and the matter is remanded to the juvenile court with directions to order the Los Angeles County Department of Children and Family Services to comply with the notice provisions of the Indian Child Welfare Act. If, after proper notice, the court finds that the child is an Indian child, the juvenile court shall proceed in conformity with the provisions of the Indian Child Welfare Act. If, on the other hand, the court finds that the child is not an Indian child, the order terminating parental rights may be reinstated by the court.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, Acting P. J.

JOHNSON, J.